

WHY PUNISH? HOW MUCH?

A Reader on Punishment

EDITED BY

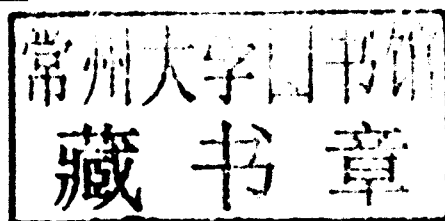
Michael Tonry

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MICHAEL TONRY



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PREFACE

Punishment theories address questions about what happens to people convicted of crimes. Some are timeless. Why may, must, or does the state punish wrongdoers? Whom may the state justly punish? How much? What considerations may be taken into account in answering the last two questions, and what considerations may not?

Some questions are as topical as today's newspaper. Can harsh sentencing laws—mandatory minimums, three-strikes, life-without-the-possibility-of-parole—be justified in normative terms? May offenders be compelled to participate in programs meant to change them? May offenders be confined indefinitely because they are “dangerous?” Can new approaches to responding to crime—restorative justice, community justice, therapeutic jurisprudence—be reconciled with traditional notions of justice? Should the law take account of recent research findings that suggest that retributive impulses in human beings are products of natural selection, that intuitions about deserved punishments are widely held, and that the belief that human beings have free will is false?

Aristotle, Plato, and others of the ancients wrote about punishment, but a systematic literature began to accumulate only in the eighteenth and early nineteenth centuries, when Immanuel Kant and Georg Wilhelm Friedrich Hegel laid foundations for subsequent retributive analyses and Cesar Beccaria and Jeremy Bentham did the same for utilitarian approaches. Interest in punishment theory has waxed and waned since then, but the opposing retributive and utilitarian ways of thinking held almost exclusive sway until the 1970s. Since then, ideas about restorative justice, community justice, and therapeutic jurisprudence have emerged and to varying degrees taken root.

Selection of the materials in this book was not easy. Punishment is a complex human institution. It has normative, political, social, psychological, and legal dimensions, and ways of thinking about each of them change over time. Courses taught in

law schools and philosophy departments attend mostly to normative issues, and secondarily to legal ones. That is understandable but seems to me too narrow. As a result, in addition to classical and contemporary works on normative theories by philosophers and penal theorists (a term often used to describe lawyers and others who write about issues more applied than those philosophers typically address), I included writings on restorative justice, on how people think about punishment, and on social theories about the functions punishment performs in human societies.

A few paragraphs about what this book contains are in order. Its contents are premised on three propositions about punishment theories and ideas. The first is that, as with all else in life, ideas go in and out of fashion. The second is that a major shift away from utilitarian and toward retributive ideas took place in the 1960s and 1970s. The third is that retributive ideas did not manage to become hegemonic, as utilitarian ideas had been for a century. By the 1990s, retributive ideas began to lose influence. In the early decades of the twenty-first century, things are in flux. There is renewed interest in rehabilitation among theorists and policy makers, programs operating under restorative justice banners are proliferating around the globe, and new ideas—dominion, community justice, therapeutic jurisprudence—are fermenting. Only people who live so long will know what ideas will predominate in 2020.

There are six parts. The first part on “classical” writings sets the stage for the late twentieth-century shift toward retributivism. I have included longer excerpts from Kant, Hegel, and Bentham than punishment readers usually provide. This is partly because their writings are considerably more nuanced and practical than is sometimes recognized; they provide a good baseline from which readers can consider the merits and novelty of subsequent writings. This part also contains a full-throated argument for individualized utilitarian sentencing and critiques of utilitarianism in principle and practice. I do not include critiques of retributivism; these are discussed in many of the writings in other parts.

The second part contains a set of influential writings from the 1970s through the 1990s offering explanations and justifications of various retributive theories. This is where the principal theoretical action was from 1970 to the 1990s. These writings mostly discuss definitions and overriding justifications of punishment and give comparatively less attention to practical policies or to how punishments might be imposed in individual cases.

The third part concerns “mixed” theories which combine retributive with utilitarian or consequentialist elements in various ways (the term “utilitarianism” has fallen out of fashion and replaced with consequentialism). Mixed theories are often characterized as being in competition with retributive theories. They are typically attentive to practical questions of application and typically focus as much or more attention on issues relating to individual cases as to more general issues of justification of punishment as a legal or social institution. Another way to think about differences between Parts II and III is disciplinary. Most of the writers represented in this part are lawyers; those in part II are philosophers.

The fourth part concerns implications of recent developments in the behavioral and medical sciences for thinking about punishment. Recent works by evolutionary biologists and psychologists suggest that human beings may be hard-wired for moral judgment and

retributive impulse because those characteristics were useful adaptations that enhanced reproductive success for thinking social animals. Work by social and other psychologists suggests that human beings in many countries share intuitions—whether biologically based or products of social learning—that wrongdoing warrants punishment and about the comparative seriousness of major forms of wrongdoing. Neurological and other brain and central nervous system research suggests that a belief in free will is unwarranted. It is too soon to know how these recent characterizations of humankind will influence punishment thinking and policy, but their implications warrant careful consideration.

The fifth part deals with restorative justice. Implementation of restorative justice and related programs is broad, but not deep. The vast majority of programs concern offenses by juveniles or minor offenses by adults. A breakthrough into adoption as the modal, or even a common, approach for handling serious crimes by adults has yet to happen. There is a large literature on roles, effects, and effectiveness of restorative justice. Among the major issues are whether restorative programs should complement or replace the official criminal justice system, and whether outcomes must be consonant with those the official system produces.

The sixth and final part concerns theories about latent functions punishment performs. A Marxist might argue that law and its institutions, including punishment, operate to further the interests of dominant economic or social classes. Emile Durkheim wrote that the criminal law and punishment are important means to preserve and reinforce basic social norms of a society, what he called the collective conscience, and that their utilitarian effects are probably small and in any case are not important. Michel Foucault proposed that the prison and punishment generally serve to shape individuals for roles they must perform in the contemporary world's mass institutions and bureaucratized existence. Loïc Wacquant and others argue that the modern American criminal justice system operates to maintain a system of racial hierarchy in which whites dominate blacks, as the late twentieth-century urban ghetto, Jim Crow laws and conventions, and slavery did in earlier times.

These are not normative accounts of how punishment ought to operate, or what goals it ought to accomplish. They are empirically-informed efforts to explain what punishment does. Readers may find any one of them more or less or not at all persuasive, but insofar as any part of them rings true... It makes you think, and it ought to make practitioners and policy makers think. What they ought to think is not clear, but a judge or legislator who worries that more is going on in the criminal courts than is consciously or widely recognized or intended may do his job in different and more self-conscious ways. I hope so.

Were space unlimited, I would have included materials on therapeutic jurisprudence and community justice, on emerging consequentialist approaches, and on political science scholarship. Therapeutic jurisprudence and community justice have had significant real-world influence. Many supporters of drug courts and other problem-solving courts, for example, say that they are applying therapeutic jurisprudence ideas. The influence of community justice ideas is harder to pin down except as an element of restorative justice, but proponents of community court and prosecution programs commonly invoke the term. The community justice and therapeutic jurisprudence

literatures, however, tend not to be theoretical. The former typically explains why community considerations are important and discusses how community justice might be implemented. Prominent writers on therapeutic jurisprudence including David Wexler and Bruce Winick, the pioneers, typically deny that it is a normative theory at all but refer to it as a diagnostic tool or a methodology for identifying destructive and constructive effects of legal rules, processes, and institutions.

“Consequentialism” came into fashion as a term to describe alternatives to retributivism in classifications of normative theory. Retributivists argue that imposition of deserved punishments is a Good Thing, irrespective of the effects of doing so. Consequentialists argue that the acceptability of punishment policies or practices depends on whether they maximize particular outcomes. Bentham often wrote of happiness and satisfaction as measures of the acceptability of a rule or practice. These terms are difficult to quantify or systematize. Economists use economic efficiency as a measure. Contemporary non-retributivists have devised others. John Braithwaite and Philip Pettit argue that policies and practices should maximize dominion, an individual’s capacity to participate in and enjoy the benefits of living in a community. Nicola Lacey argues that effects on the nature and sense of community are important. All of these ideas are provocative and useful. Economic theories are by definition non-normative, however, and ideas about dominion and community well-being have been little developed except by their creators. In the end I decided to stick with Bentham and the system of indeterminate sentencing which for a century in many ways embodied his approach.

Political science literatures have undeniable real world relevance. Practitioners make punishment decisions in individual cases and elected officials set the policies that guide them (or that they sometimes ignore or evade). A rich empirical literature on courtroom work groups and local legal cultures instructs that a wide range of influences—personalities, personal self-interest, political considerations, social pressures, institutional priorities, needs to allocate scarce resources—in addition to the facts of cases and the relevant laws influence decisions. Literatures on legislative policy-making and executive action also have obvious relevance.

Normative considerations inevitably influence practitioners’ decisions and the policies officials set. It seems likely that they are the same kinds of normative considerations that theorists puzzle over. Their influence, however, is contingent and often they must co-exist or compete with larger political agendas, interests, and ideologies. Taking on those complexities seemed unrealistic for a reader on punishment theory.

Preparation, production, and publication of any book require work by many people. Su Smallen did indispensable bibliographical and organizational work. Adepeju Solarin, and Joe Jackson and Eileen Patten of Oxford University Press, arranged permissions to republish copyrighted work. ‘Peju kept the trains on the track and on time. Michael Abts, Reece Almond, Colleen Chambers, and Eric Taubel performed the wearying and eye-bleary task of proofing retyped writings against the originals. The following friends and colleagues offered useful critiques of successive drafts of the table of contents and the introduction: Brian Bix, Susanna Blumental, Antony Duff, Barry Feld, Richard Frase, Marc Miller, Kevin Reitz, and Julian Roberts. I am grateful to them all.

This is the first book I've edited that consists mostly of previously published writings, so effusive thanks to the writers for their long-suffering and good-spirited cooperation seems not in order. Gratitude to the writers nonetheless is warranted. Isaac Newton, a giant and not by reputation a modest man, in explaining his not inconsiderable accomplishments, said that he had stood on the shoulders of giants. Some of the people whose writings appear in this book are giants and all (I except my own entry) offer original and thought-provoking insights. Standing on their shoulders, we all can learn.

M.T.

Deer Isle, Maine

June 2009

CREDITS

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